STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH POLIMENI and JOSEPH POLIMENI PHOTOGRAPHY, INC.,	UNPUBLISHED June 21, 2007
Plaintiffs-Appellants,	
v	No. 274419 Wayne Circuit Court
GENERAL MOTORS CORP,	LC No. 05-521600-CK
Defendant-Appellee.	

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

In this contract case, plaintiffs Joseph Polimeni and Joseph Polimeni Photography, Inc., (collectively, Polimeni) appeal as of right the trial court's order granting defendant General Motors Corp. (GM) summary disposition under MCR 2.116(C)(10). We affirm.

I. Basic Facts And Procedural History

Polimeni is a freelance photographer who provided photographic services for GM from the early 1990s through 2005. In 2005, Polimeni filed a three-count complaint for account stated, breach of contract, and promissory estoppel. In count I, Polimeni alleged that GM owed him $35,194.92 for six unpaid invoices for photo media services. In count II, Polimeni alleged that GM breached the terms of a 2001 oral contract in which GM agreed that Polimeni would be GM's "exclusive photo media professional." And, in count III, Polimeni alleged that GM was liable under a theory of promissory estoppel because he detrimentally relied on GM's promise that he would be the exclusive photographer for "major events."

GM moved for summary disposition under MCR 2.116(C)(10), arguing that the claim of account stated failed as a matter of law because GM disputed the validity of the charges. GM also argued that the existence of a 1999 written contract with Polimeni precluded his claims for breach of oral contract and promissory estoppel.

After hearing oral arguments on the motion, the trial court reached the following conclusions on the record. With respect to count I, the trial court found that, because GM disputed the charges presented in the invoices, Polimeni's account stated claim was not sustainable. Regarding count II, the trial court concluded that the purchase order was *the* agreement between the parties and noted that, as provided by its general terms, Polimeni's

performance of services constituted his acceptance of the terms and conditions of that contract, which included an integration clause. Thus, the trial court concluded that Polimeni's claim for breach of an oral contract could not be sustained. The trial court also agreed with GM that, even assuming an oral agreement existed, it was terminable at will. Last, turning to count III, the trial court ruled that the written contract prohibited Polimeni's claim of promissory estoppel. Accordingly, the trial court granted summary disposition in GM's favor on all three counts. Polimeni now appeals.[1]

II. Summary Disposition

A. Standard Of Review

Polimeni argues that the trial court erred in granting summary disposition in favor of GM because the trial court made improper findings of fact. Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[2] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[3] However, the trial court is not permitted to determine facts on a motion for summary disposition.[4] We review de novo the trial court's ruling on a motion for summary disposition.[5]

B. Breach Of Contract

Polimeni argues that the trial court erred by making the factual determination that the purchase order was the one and only binding contract between GM and Polimeni when the parties also entered into an oral agreement. GM asserts that at the time it allegedly entered the oral contract with Polimeni their relationship was already governed by a written contract, thus barring the creation of the alleged oral contract.

On March 16, 1999, GM issued Blanket Purchase Order GMB06090 to Polimeni "to cover Photography activities for GM VSSM." The effective date of the order was March 22, 1999, and the expiration date was set as March 21, 2000. The agreement was later modified and extended numerous times through December 2003. After the purchase order ultimately expired, GM hired Polimeni on an assignment-by-assignment basis. An email from William O'Neill,

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[1] Polimeni concedes that the trial court properly dismissed his account stated claim; thus, he does not present that as an issue on appeal.

[2] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[3] MCR 2.116(G)(5); *Maiden*, *supra* at 120.

[4] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[5] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

GM's Executive Director of Communications, indicates that the need for an updated purchase order was considered in 2004, but apparently, those negotiations fell through.

Polimeni does not dispute the existence of the original purchase order agreement. Indeed, in GM's interrogatories, it requested that Polimeni "describe each and every contract and/or agreement, including oral agreements and modifications, entered into by and between you and GM." Polimeni responded, in pertinent part, as follows: "In approximately 1997-98, Thomas J. Pyden, Director of Chevrolet Communications, initiated process for Blanket P.O. GMB 06090 with Joe Polimeni Photography, Inc." Further, in his deposition, Polimeni admitted that, after he and Thomas Pyden discussed the need to create a purchase order, Polimeni sent over an Excel spreadsheet listing his rates, and, in return, he received a copy of the original purchase order.[6]

Based on our review of the record, we conclude that there is no genuine issue of material fact that the 1999 purchase order was a written contract for services between the parties that was still effect at the time that Polimeni claims he entered the alleged oral contract with GM.

The reverse side of the original purchase order and each amendment contained a list of general terms and conditions, one of which was an integration clause that provided as follows:

> This contract, together with the attachments, exhibits, supplements or other terms of Buyer specifically referenced in this contract, constitutes the entire agreement between Seller and Buyer with respect to the matters contained in this contract and supersedes all prior oral or written representations and agreements. This contract may only be modified by a contract amendment issued by Buyer.

Polimeni argues on appeal that he never saw or read the general terms and conditions included on the back of the purchase order form. However, as stated, he admitted that he received a copy of the original purchase order form. And the front of that purchase order states,

> On the reverse side hereof are the terms and conditions to which Seller agrees by acceptance of this order agreement between Buyer and Seller and no other agreement in any way modifying any of said terms and conditions will be binding upon the Buyer unless made in writing and signed by Buyer's authorized representative.

Thus, even if he never looked at the back of the form, Polimeni was put on notice by this language on the front of the document that there were additional terms of which he should be aware.

Polimeni also argues that he is not bound by the purchase order because he never signed it. However, under the general terms of the contract, his performance of services under the

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[6] Although claiming that he kept that copy of the original order form, at the time of his deposition he indicated that he no longer had possession of that copy in his records.

stated terms constituted his agreement to those terms. Specifically, the contract stated as follows: "Seller has read and understands this contract and agrees that Seller's written acceptance or commencement of any work or services under this contract shall constitute Seller's acceptance of these terms and conditions only." Moreover, because the express expiration date was less than one year from the creation of the contract, his signature was not necessary to validate the contract.[7] Thus, we conclude that Polimeni was bound to the terms of the purchase order.

GM argues that this integration/written modification clause absolutely precludes a finding that any subsequent oral contract could be valid. However, contrary to GM's argument, the Michigan Supreme Court has made clear that

> [p]arties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract. . . .
>
> This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract.[8]

Therefore, the creation of an oral contract was possible in this case despite the existence of the written modification clause. And resolution of the existence of such an oral contract would ordinarily require a remand to the trial court for a finding of fact regarding whether clear and convincing evidence supported the existence of a mutual agreement to modify the original purchase order terms.

However, we agree with GM that, even assuming an oral contract was created, because Polimeni admitted that terms for duration or termination of the contract were never discussed, the contract was terminable at will by either party.[9] Accordingly, GM was entitled to discontinue using Polimeni's services at any time and Polimeni was not entitled to a lifetime contract to serve as GM's exclusive photographer. We conclude that the trial court properly dismissed Polimeni's breach of oral contract claim.

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[7] See MCL 566.132(1); *Kelly-Stehney & Assoc v MacDonald's Industrial Products*, 265 Mich App 105, 110-111; 693 NW2d 394 (2005).

[8] *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003) (emphasis in original); see also *Kelly-Stehney & Assoc, supra* at 117.

[9] *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 236; 324 NW2d 732 (1982); *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 654-655; 513 NW2d 441 (1994).

C. Promissory Estoppel

A claim for promissory estoppel is not viable when a written contract exists between the parties that covers the same subject matter.[10] Polimeni admits that a written contract governed his relationship with GM during the time when GM allegedly promised that he would be the exclusive photographer for all major events. And, by its terms, the purchase order was written to cover Polimeni's "Photography activities for GM VSSM." Thus, the trial court also properly dismissed Polimeni's promissory estoppel claim.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello

[10] See *Martin v East Lansing School Dist*, 193 Mich App 166, 178-180; 483 NW2d 656 (1992).